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January 6, 1993

92-259

Office of the Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, D.C. 20554

Dear Mr. Secretary:

Enclosed please find the original and nine corrected copies of the Comments of Discovery Communications, Inc. which was served on Monday, January 4, 1993. Please substitute these copies for those filed on that date.

If you have any further questions, please feel free to call me.

Sincerely,

Garret G. Rasmussen

GGR/dg

Enclosures as stated.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues	MM Docket No. 92-259

COMMENTS OF DISCOVERY COMMUNICATIONS, INC.

Discovery Communications, Inc. ("Discovery Communications") hereby submits its comments in response to the Notice of Proposed Rule Making (the "Notice") in the above referenced proceeding. Discovery Communications owns The Learning Channel and operates The Discovery Channel. Both channels license their programming to cable operators.

A. Background

The Discovery Channel, founded in 1985, is now the fifth largest cable network. Its programming regularly provides serious commentary on issues of national and international significance. For example, installments of "Discovery Journal" have addressed issues such as capital punishment and world hunger. The Discovery Channel also features documentaries, including such prize-winning programs as "In the Company of Whales," "Red Sea," and "Russia: Live From The Inside."

The Learning Channel was acquired by Discovery Communications in 1991, and after substantial revamping, was

relaunched later that year. The Learning Channel features educational programming for viewers of all ages and education levels. For example, it includes six hours of commercial-free educational programs for preschoolers every weekday morning, programs for elementary and high school students, programs for adults who need to improve their reading skills, and programs for teachers.

The Discovery Channel is carried by most cable operators and has approximately 59 million subscribers. The Learning Channel is carried by approximately 15% of multichannel video programming distributors and has approximately 17.5 million subscribers.

B. Must-Carry Regulations

1. The Act's Underlying Must-Carry Provisions Are Unconstitutional.

The must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("the Act") violate the First Amendment by targeting cable operators and programmers, both of whom have the same First Amendment rights as newspapers. See Leathers v. Medlock, 111 S. Ct. 1438, 1442 (1991). Those provisions compel cable operators to carry programs they would not otherwise carry and thus unconstitutionally deprive them of their editorial discretion and unconstitutionally force speech. See Quincy Cable TV, Inc. v. Federal Communications Commission, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). As a result,

cable programmers such as The Discovery Channel and The Learning Channel will be displaced, thereby unconstitutionally limiting their audience. See City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988); Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781 (1988).

In fact, a number of cable operators who were considering carrying The Learning Channel are no longer willing to do so because of the need to reserve space for local commercial and public broadcasters which must be carried pursuant to the Act. (See Declaration of Bill Goodwyn attached as Exhibit B.) A number of cable operators also have informed The Discovery Channel that they will move it from the basic program tier to make space available for broadcast stations that must be carried on the basic tier pursuant to the Act. (See Supplemental Declaration of Dawn McCall, attached as Exhibit C.)

On November 12, 1992, Discovery Communications filed a complaint in federal district court in Washington, D.C., asking, among other things, that the must-carry provisions of the Act be declared unconstitutional and that the Commission be enjoined from promulgating regulations pursuant to the unconstitutional provisions. A copy of that complaint is attached as Exhibit A.

Discovery Communications submits these comments without prejudice to any of its constitutional claims and without waiving its rights to any judicial relief it is seeking.

2. The Commission's Regulations Should Avoid Compounding First Amendment Intrusions on Cable Operators and Cable Programmers.

The Commission's must-carry regulations cannot cure the Act's facial constitutional defects.[1/] No matter how the Commission defines a "local commercial station" or "television market," no matter how it requires cable operators to select its quota of local broadcast stations, and no matter how it determines conflicting claims by local broadcasters for premium channel designations are to be resolved, cable operators still will be unconstitutionally required to carry and give preference to local broadcast stations. Thus, this rulemaking cannot save the must-carry provisions from facial unconstitutionality.

Nevertheless, the Commission's regulations should not compound the injury resulting from the unconstitutional must-carry requirement.[2/] Wherever possible the Commission should avoid adopting regulations that would expand must-carry

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1/ Nor can the Commission declare an Act of Congress unconstitutional. Johnson v. Robinson, 415 U.S. 361 (1974). As a leading treatise states, "We commit to administrative agencies the power to determine constitutional applicability, but we do not commit to administrative agencies the power to determine constitutionality of legislation. Only the courts have authority to take action which runs counter to the expressed will of the legislative body." Davis, Administrative Law, § 20.04.

2/ The possibility that the Commission is now considering regulations under the must-carry requirement does not interdict a challenge to the underlying provision which is facially unconstitutional before such regulations are adopted. Nixon v. Administrator of General Services Administration, 433 U.S. 425, 439 (1977).

obligations beyond the minimum possible scope allowed by the Act. For example, the Commission should act in a manner consistent with this objective as it resolves the following definitions: (i) "qualified local NCE station" (Notice, ¶ 7), (ii) a cable operator's "principal headend" (¶ 8), (iii) "substantial duplication" (¶¶ 11, 25), (iv) "local commercial station" (¶ 17), (v) a broadcasting station's television "market" (¶ 18), (vi) "network affiliate" (¶ 26), (vii) "qualified low power television stations" (¶ 27), (viii) "predominantly utilized for the transmission of sales presentations or program length commercials" (¶ 31), and (ix) "multichannel video programming distributor" (¶ 42).

3. The Commission's Regulations Should Not Apply The Act In A Retroactive Manner.

The Act does not provide for retroactive application, and regulations adopted by the Commission should be prospective only. As a matter of statutory construction, retroactive application of a statute is disfavored. Alexander v. Robinson, 756 F.2d 1153, 1156 (5th Cir. 1985) ("Retroactive application of the laws is undesirable where advance notice of the change in the law would motivate a change in an individual's behavior or conduct."); Bitronics Sales Co. v. Microsemiconductor Corp., 610 F. Supp. 550, 555-557 (D. Minn. 1985). Thus, for example, the Commission's regulations should not have the effect of interfering with existing contracts with cable programmers. (For further discussion of the impropriety of abrogating existing contracts, see section 4, below.)

4. The Commission's Must-Carry Regulations Must Respect Existing Contracts Between Cable Systems and Programmers.

Both The Discovery Channel and The Learning Channel have pre-existing contracts with cable operators governing all the terms and conditions under which their programming may be exhibited. These contracts are the result of good-faith negotiations and involve a multitude of bargained-for terms, including price, license period, and in some cases channel placement. Both cable programmers and operators have relied on these contracts.

The must-carry provisions of the Act are silent with respect to the abrogation of existing contracts between cable operators and programmers, and the Act should not be construed to require abrogation. Abrogation of existing common law rights is disfavored, and statutes which threaten existing contractual rights must be strictly construed. Sutherland, Statutory Construction, §61.06 (5th ed. 1992). Thus, given the absence of any provision in the must-carry section of the Act expressly abrogating the terms of existing contracts between cable operators and cable programmers, the Commission's regulations should not require that a cable programmer be dropped to provide space for a broadcaster nor that channel positions be changed, where to do so would violate an existing contract between a cable operator and a cable programmer.

In addition, basic fairness requires deference to existing contracts between cable programmers and cable systems. Just as the Commission has proposed in its regulations that existing

contracts between cable systems and broadcasters be protected even where the result might be to defer full implementation of the Act's provisions (Notice, ¶¶33 and 38), so should it adopt regulations that permit cable systems to continue to abide by their contracts with cable programmers.

5. The Commission's Regulations Should Treat Cable Programmers and Television Broadcasters Even-Handedly

In exercising its regulatory discretion and apart from the issue of honoring existing contracts, the Commission should wherever possible treat cable programmers and television broadcasters in an even-handed manner. For example, basic fairness requires that, if the Commission's regulations require cable operators to provide thirty days' notice to broadcasters and subscribers of deletion and/or channel repositioning, cable systems also should be required to provide such notice to cable programmers and their subscribers when cable programmers are deleted and/or repositioned.

C. Retransmission Consent

Although Discovery Communications has not challenged the constitutionality of retransmission consent standing alone, the retransmission-consent provision is inextricably linked to the must-carry provisions, and thus should fall with the must-carry provisions as requested by a number of parties in the federal court litigation. The Commission's Notice highlights the linkage between the must-carry provisions and the retransmission-consent provisions of the Act, observing that "the implementation of the new Section 325(b) and the new Section 614 must be addressed

jointly" (Notice, ¶48). Congress' obvious intent was that the must-carry provisions and the retransmission-consent provisions work together, complementing each other. In such a situation, the Supreme Court has held that the linked provisions must fall with the unconstitutional provisions even when there is a severability clause in the act. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987). Here, there is no suggestion that Congress would have enacted the retransmission-consent provision standing alone. To the contrary, Congress conditioned retransmission consent on giving up something of value -- the must-carry right. If Congress had meant to convey a general, risk-free retransmission right, it would have done so without linking it to the must-carry provisions.

The conflation of the must-carry provisions and the retransmission-consent provision also compound the First Amendment injury to cable operators and programmers. Cable operators are not only forced to speak, they are forced to speak in a manner which is most harmful to them. Under the Act's scheme, only the less popular stations will opt for must carry rather than seeking compensation for the retransmission of their programming.

In order to avoid further exacerbating the injury resulting from the unconstitutional must-carry provisions, regulations adopted by the Commission pursuant to retransmission-consent provisions of the Act should be expressly conditioned on the constitutionality of the must-carry provisions.

Respectfully Submitted,

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